IN MATTER OF THE WILL OF MURAL W. BARNES

IBIA 96-22 Decided September 23, 1996

Appeal from the approval of an Osage will by the Acting Superintendent Osage Agency, Bureau of Indian Affairs.

Affirmed.

1. Indian Probate: Secretary's Authority: Generally--Indian Probate: Wills: Approval' Of Will--Indians: Osage Headrights

   Federal law vests in the Secretary of the Interior the exclusive authority to approve the wills of Osage, Indians, insofar as those wills dispose of restricted Osage property.

2. Indian Probate: Secretary's Authority: Jurisdiction of the Courts--Indian Probate: Wills: Approval of Will--Indians: Osage Headrights

   Where an Osage will disposing of restricted Osage property is, contrary to Federal law, probated in a state court prior to approval of the will by the Secretary of the Interior, the Secretary is not required to give full faith and credit to the state court probate.

3. Board of Indian Appeals: Generally--Indians: Generally

   The Board of Indian Appeals has a well-established practice of declining to consider arguments or issues raised for the first time on appeal.

APPEARANCES: Jack L. Brown, Esq., Tulsa, Oklahoma for appellant Heidi Leon; Robert P. Kelly, Esq., Pawhuska, Oklahoma, for appellee Carol S. Kelly; M. John Kane, Esq., Pawhuska, Oklahoma, for appellee Judy W. Wyoma Hernandez.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Heidi Leon seeks review of a November 3, 1995, order issued by the Acting Superintendent, Osage Agency, Bureau of Indian Affairs (Superintendent), approving the will of Mural W. Barnes (testatrix), subject to the right of Carol S. Kelly, Judy W. Wyoma Hernandez, and Thomas Lloyd Sawyer to take their intestate shares of the estate. For the reasons discussed below, the Board affirms the Superintendent's order.

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Background

Testatrix, Osage Allottee 2116, died on December 28, 1994, in Miami, Florida. She was survived by four grandchildren, Carol S. Kelly, Judy W. Wyoma Hernandez, Thomas Lloyd Sawyer, and appellant. All four were children of testatrix's predeceased daughter, Billie W. Sawyer.

In a will executed in Florida on April 27, 1990, testatrix devised her entire estate to her son Jack W. Barnes, Jr., but provided that, if her son predeceased her, her entire estate would pass to appellant. Testatrix's son died on December 12, 1993.

Appellant presented testatrix's will for probate in Florida, where it was admitted to probate on January 17, 1995. The Florida probate was apparently completed on June 16, 1995, when appellant was discharged as personal representative. In Re: Estate of Mural Wymo Barnes, No. 95-109 (Cir. Ct., Dade Go., Florida). Appellant states that, "[p]ursuant to the dictates of the will, [appellant] received all of [testatrix's] property" in that probate (Appellant's Brief at 3).

On April 6, 1995, appellant filed a petition with the Superintendent, seeking approval of testatrix's will insofar as it devised her restricted Osage property. Both Kelly and Hernandez filed objections to the will. On July 27, 1995, a hearing in the matter was conducted by the Special Attorney for the Osage Indians. At the hearing, and in pre-hearing briefs, Kelly and Hernandez contended that they were pretermitted heirs under Oklahoma law and therefore entitled to receive their intestate shares of testatrix's estate. Appellant contended that the Superintendent must give full faith and credit to the Florida probate and that Kelly and Hernandez were not pretermitted heirs under either Florida or Oklahoma law.

By memorandum dated October 31, 1995, the Special Attorney recommended that the Superintendent approve testatrix's will, subject to the right of Kelly, Hernandez, and Thomas Sawyer to take their intestate shares in the estate. The Special Attorney's memorandum stated in part:

> I do not believe that the Superintendent is required as a matter of federal law to follow the order of the Florida probate court. * * * [I]t is clear that Congress intended for the Secretary, not a state court, to ultimately determine the validity of an Osage will. To afford full faith and credit to the Florida decision would require the Secretary to cede that obligation to a court in another state, */ which would thwart the express will of Congress. In addition, inasmuch as there is no indication that the Florida court considered the federally imposed requirements for Osage wills, this approach would deprive the Osage heirs of a forum which would consider federal Osage law.
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> The second issue raised, related to the first, is whether to apply Florida law or Oklahoma law to the interpretation of this will. The [Act of Oct. 21, 1978, 92 Stat. 1660] provides that

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the Superintendent is to use Oklahoma law in this proceeding. It appears clear that the Oklahoma law is to be used to interpret the will. In addition, In re Revard's Estate, 63 P.2d 973 (Okla. 1936), holds that Oklahoma law will be used in the interpretation of an Osage will executed in Texas. As a consequence, Oklahoma law will be used to interpret the will.

Under Oklahoma law, the grandchildren in this case are pretermitted. They are the children of a predeceased child, Billie W. Sawyer. The grandchildren were not mentioned in the will; indeed, the child was not mentioned in the will and was living at the time the will was executed. The decision in Revard's Estate seems to be directly on point. If the grandchildren were not mentioned in the will, they will take by intestacy unless it appears from a reading of the will that the omission was intentional. In this case, the omission does not appear intentional. They were not mentioned in the will and the entire estate was given to other heirs. See Estate of Gooldy, 815 P.2d 1213 (Okla. Ct. App. 1991).

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*/ Such an approach would essentially allow a proponent of a will to foreclose Secretarial inquiry by the simple expedient of obtaining a state court decision regarding the validity of a will before presenting it to the Secretary.

(Special Attorney's Oct. 31, 1995, Memorandum at 2-3).

On November 3, 1995, the Superintendent issued an order approving the will. The order stated that it was based upon the reasons given in the Special Attorney's recommendation.

Appellant appealed the Superintendent's November 3, 1995, order in accordance with 25 CFR 17.14. Appellant, Kelly, and Hernandez filed briefs on appeal.

Discussion and Conclusions

On appeal to the Board, appellant again contends that the Superintendent should have given full faith and credit to the Florida probate. She argues: "Contestants should have contested probate of [testatrix's] will in the Florida Probate. Nothing would have prevented Contestants from contesting the Florida Probate nor would anything have prevented the Florida court from applying Oklahoma law to the disposition of [testatrix's] headright" (Appellant's Brief at 7).

Where the will of an Osage Indian disposes of restricted Osage property, approval of the will is governed by sec. 8 of the Act of Apr. 18, 1912, 37 Stat. 86, 88, as amended by sec. 5(a) of the Act of Oct. 21, 1978, 92 Stat. 1660, 1661, and sec. 3(b) of the Act of October 30, 1984, 98 Stat. 3163, 3166. As amended, the provision reads:

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> [A]ny person of Osage Indian blood, eighteen years of age or older, may dispose of his Osage headright or mineral interest and the remainder of his estate (real, personal, and mixed, including trust funds) from which restrictions against alienation have not been removed, by the terms of a will, or the terms of a testamentary trust created by a will, executed in accordance with the laws of the State of Oklahoma * * *: Provided, That the will of any Osage Indian shall not be admitted to probate or have any validity unless approved after the death of the testator by the Secretary of the Interior. The Secretary shall conduct a hearing as to the validity of such will at the Osage Indian Agency in Pawhuska, Oklahoma. * * * Notwithstanding any appeal from the decision of the Secretary, approval of such will by the Secretary shall entitle it to be admitted to probate without further evidence as to its validity or, upon disapproval thereof, the heirs may immediately petition for letters of administration in the district court. * * * No court except a Federal court shall have jurisdiction to hear a contest of a probate of a will that has been approved by the Secretary. Any such appeal * * * shall be on the record made before the Secretary and his decisions shall be binding and shall not be reversed unless the same is against the clear weight of the evidence or erroneous in law.

[1, 2] It is apparent from this provision that jurisdiction over the approval of testatrix's will, insofar as it devised restricted Osage property, was vested exclusively in the Secretary. The admission of testatrix's will to probate in the Florida court, prior to its approval by the Secretary, was explicitly prohibited by Federal law. Thus, it is beyond dispute that the Florida court lacked jurisdiction to probate testatrix's restricted Osage estate.

It is black letter law that the courts of one state are not required to give full faith and credit to a judgment rendered by a court of another state when the latter court lacked jurisdiction over the subject matter of the proceeding. E.g., New York ex rel. Halvey v. Halvey, 330 U.S. 610, 614 (1947); 47 Am. Jur. 2d Judgments § 1254 (1969); 50 C.J.S. Judgments § 889 (1947). Given the Federal statute which controls here, it is equally, if not more, certain that the Superintendent was not required to follow the Florida probate. The Board finds that the Superintendent correctly declined to do so.

Appellant also argues, for the first time in this appeal, that the Florida probate is conclusive because Kelly and Hernandez failed to contest it within the time allowed under Oklahoma law. Appellant contends that, under Oklahoma law, Kelly and Hernandez were required to contest the will within 3 months after January 17, 1995, when the will was admitted to probate in Florida.

[3] The Board has a well established practice of declining to consider issues raised for the first time on appeal. E.g., Estate of Rufus Ricker Jr., 29 IBIA 56 (1996), and cases cited therein. Therefore, the Board need not consider this argument. Even if it were to consider the argument, the

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Board would reject it for reasons similar to those just discussed. Testatrix's will was not presented to a forum with jurisdiction over her restricted Osage estate until April 6, 1995, when appellant filed her petition with the superintendent. Kelly and Hernandez filed their objections on May 19, 1995, well within 3 months after appellant filed her petition.

Appellant also contends that the Superintendent erred in finding that Kelly, Hernandez, and Thomas Sawyer were pretermitted heirs. She argues that, "under Oklahoma law, in order to be a pretermitted heir, one must be either the child or the issue of any deceased child at the time the Will in issue was executed" (Appellant's Brief at 4-5), and that the Superintendent and the Special Attorney erred in relying upon Revard's Estate, because, in that case, unlike the present one, the parent of the grandchildren found to be pretermitted heirs was deceased at the time the grandfather/testator executed his will. As the Board understands her argument, appellant is contending that, in order for a grandchild to be a pretermitted heir under Oklahoma law, the grandchild's parent must have been deceased at the time the will was executed.

84 Okla. Stat. § 132 provides:

> When any testator omits to provide in his will for any of his children, or for the issue of any deceased child unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator, as if he had died intestate.

It is true, as appellant contends, that, in Revard's Estate, the parent of the grandchildren found to be pretermitted heirs was deceased as the time the testator executed his will. 1/ In a more recent Oklahoma Supreme Court decision, however, in which grandchildren were found to be pretermitted heirs, the grandchildren's parent was living at the time the testator's will was executed. The court found no evidence that the testator intended to disinherit the parent, testator's daughter, or that he "intended to disinherit his grandchildren should they--in the event his daughter, their mother, predeceased him,--become his presumptive heirs at the effective date of the will." In re Estate of Daniels, 401 P.2d 493, 498 (Okla. 1965). Thus it is clear that, under Oklahoma law, grandchildren are pretermitted heirs if they were unintentionally omitted from the will and their parent, who was living at the time the will was executed but who predeceased the testator, was also unintentionally omitted.

Appellant does not discuss Daniels but contends that In re Estate of Kane, 828 P.2d 997 (Okla. Ct. App. 1992), "is the best Oklahoma authority on the issue of pretermitted grandchildren." (Appellant's Brief at 4). In Kane, the testatrix had devised the residue of her estate to her husband and provided that, if her husband did not survive her, the residue was to go to her son and that, if neither her husband nor her son survived her, it was

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1/ The Oklahoma Supreme Court noted, however, that the testator may not have known, at the time he executed his will, that his son was deceased. 63 P.2d at 974.

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to go to her daughter. Both her husband and her son predeceased her. The son's children claimed to be pretermitted heirs. The court rejected the claim, finding that the testatrix had intentionally disinherited her son's children by providing an alternate disposition in the event her son predeceased her.

Appellant appears to disregard entirely the critical finding in Kane--that the grandchildren had been intentionally disinherited. In fact, although she contends that Kane is relevant here, appellant makes no attempt to show that, in this case, testatrix intentionally disinherited Kelly, Hernandez, and Thomas Sawyer, or their mother, Billie W. Sawyer.

In In re Estate of Woodward, 807 P.2d 262, 264 (Okla. 1991), the Oklahoma Supreme Court stated: "In interpreting Section 132, this Court has consistently held that the intent to disinherit an heir must appear upon the face of the will in strong and convincing language." See also, e.g., Gooldy, supra, 815 P.2d at 1214; Daniels, 401 P.2d at 495-46.

Appellant does not contend that the omissions in this case were intentional, let alone that testatrix's intent to disinherit Kelly, Hernandez, and Thomas Sawyer, or their mother, Billie W. Sawyer, appeared on the face of the will in strong and convincing language.

The Board finds that appellant has failed to show error in the Superintendent's decision.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, DM Release 2937, Mar. 19, 1992, the Superintendent's November 3, 1995, order approving will is affirmed.

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Anita Vogt
Administrative Judge

I concur:

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Kathryn A. Lynn
Chief Administrative Judge

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